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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1904.

No. 47.

FANNIE N. DRESSER CRAMER, TAYLOR A. SNOW and HENRY R. GAGE,
Plaintiffs in Error,

vs.

FREDERICK K. WILSON,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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GEORGE GILLETTE,
Solicitors for Defendant in Error.

Law Reporting Co., Printers, Denver.

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STATEMENT.

We take leave to submit the following statement in order to present a clearer and more logical history of the facts and questions involved than is presented in the brief of counsel for plaintiffs in error and in order to correct some of the inaccuracies there appearing:

On January 31, 1888, Fanny N. Dresser Cramer, plaintiff in error, claimed to be owner of the premises in con-

troversy, and, on that day, she conveyed by quit-claim deed, in consideration of $1.00 and other considerations, a one-third interest in said premises to her sister, Lilly Belle Dresser, and on the same day a written agreement was entered into and filed of record between Fanny N. Dresser, Lilly Belle Dresser and Henry H. Gage, which provided that Fanny N. Dresser and Lilly Belle Dresser claimed title to the premises in controversy; that Gage desired to purchase the same, and that it was agreed between the parties that Fanny N. Dresser and Lilly Belle Dresser should institute proceedings to clear the title from adverse claimants, and when the title had been so cleared they were to convey the premises to the defendant in error, Henry H. Gage (p. 113).

On the next day—February 1, 1888—Fanny N. Dresser filed the bill in this case in the Superior Court of Cook County, Illinois, for a partition of the premises in controversy against Henry H. Gage, Lilly Belle Dresser, and Julia Wilson, and certain tenants (p. 6). On March 5, 1888, the death of Julia Wilson was suggested and Frederick R. Wilson was made a party defendant as the sole devisee of Julia Wilson.

The defendant Gage answered, charging that he was the owner of the premises by virtue of certain tax deeds.

On October 15, 1888, the complainant, Fanny N. Dresser, filed an amended bill charging that she had learned that defendant H. H. Gage claimed by virtue of certain tax deeds, and charges that they are of no legal effect, but merely equitable liens for amounts paid with interest, which sums she tenders and asks that the tax deeds be removed as a cloud on her title.

On April 1, 1889, complainant filed a further amendment to her bill charging that on August 31, 1878, defendant in error Wilson was adjudged a bankrupt and that R. E.

Jenkins was appointed his assignee; that at that time said F. R. Wilson held all the equitable interest, if any, in the property in question, which passed by deed to Julia Wilson, which deed, though in the form of an absolute deed, was in fact a deed in the nature of a trust deed for the securing of an alleged indebtedness; that the interest of Frederick R. Wilson passed to Robert E. Jenkins, assignee, and asked that said Jenkins be made a party defendant. (P. 9.)

May 8, 1889, Robert E. Jenkins filed an answer admitting the allegations in the second amended bill in reference to the bankruptcy of Wilson, and that he, Jenkins, had acquired the interest of F. R. Wilson. (P. 212.)

H. H. Gage filed an answer to the second amended bill, also admitting the bankruptcy of said F. R. Wilson, and that said F. R. Wilson had no interest in the lands in question, and charged that the said Wilson did not schedule the real estate in controversy in bankruptcy and that the interest of said Wilson passed to said Jenkins, assignee; and also charged that the deed of F. R. Wilson to Julia Wilson was executed with intent to hinder, delay and defraud the creditors of said F. R. Wilson, and that by reason thereof the title of said Wilson passed to Jenkins, as his assignee in bankruptcy.

October 24, 1889, Fanny N. Dresser filed a supplement to her bill of complaint, charging that since the filing of the original bill, Jenkins, as assignee in bankruptcy of F. R. Wilson, had sold the property in controversy to one Taylor A. Snow, and asked that said Taylor A. Snow be made party defendant. (P. 14.)

In November, 1899, Taylor A. Snow was served with summons as a party defendant, and answered, stating that he (Snow) had acquired the interest of F. R. Wilson, by purchasing the same for the sum of $250.00 at an assignee's sale held pursuant to an order of the United States District

Court sitting in bankruptcy; that a deed had been issued to him by said assignee and that he had become the owner of the property in question. Subsequent to this F. R. Wilson filed an answer, denying the various allegations of the amended and supplemental bill of the complainant and the answers of Gage and Snow, and charged that all of the right, title and interest of the said F. R. Wilson was conveyed to his sister, Julia Wilson, prior to the time that said F. R. Wilson went into bankruptcy, and that the interest of Julia Wilson had passed to him by her will.

During the year 1889, under the pleadings above described, said cause was referred to a Master in Chancery of said Superior Court, and the testimony of Frederick R. Wilson taken. (P. 241.)

Patrick McCormick, another witness, also testified in behalf of complainant. (P. 265.) Anton Beck was also called as a witness before said Master. (P. 271.)

The defendant Frederick R. Wilson was recalled for further examination on the hearing before said Master. (P. 273.)

The case was afterwards heard by the Chancellor upon the foregoing evidence and certain documentary evidence offered on behalf of the complainant and the defendants Snow and Gage, and on August 11, 1890, the Superior Court entered a decree as follows:

Finds that Julia Wilson died testate, devising to F. R. Wilson such interest in the premises in controversy as she had; that Lilly Belle Dresser died and had conveyed her interests before her death to said H. H. Gage; that on February 1, 1888, being the date of the commencement of this suit, Fanny N. Dresser and Lilly Belle Dresser were the owners in common of the title to the premises in controversy, Fanny N. Dresser owning two-thirds of the same, and Lilly Belle Dresser one-third; that since the com-

mencement of the suit, Lilly Belle Dresser had conveyed her one-third to the plaintiff in error Gage; that the defendant in error Frederick R. Wilson, neither individually nor as the devisee of Julia Wilson, has any interest in said lands; that F. R. Wilson at one time had a tax deed to said lands under which he had possession, but that he was adjudged a bankrupt, and was at the time indebted to Julia Wilson and had transferred this property to her as security therefor, but that said deed was never filed for record until after said F. R. Wilson had been adjudged a bankrupt; that his assignee Jenkins, on learning of the interests of said Wilson, applied for and was given leave by the District Court to sell the same, and did sell said premises to plaintiff in error Taylor A. Snow; that Wilson applied to set aside said sale, and a hearing was had on said application, and the same was denied; and that all the interest of Wilson passed by said sale to defendant Taylor A. Snow.

The decree further provided that H. H. Gage claims to have some interest by virtue of tax deeds, but that all such interests have been amicably adjusted between Fanny N. Dresser and H. H. Gage; that all Wilson's interest passed to Jenkins, assignee, and was sold to Taylor A. Snow, who is now the owner thereof, and that he (Snow) has made amicable arrangements with complainant and defendant H. H. Gage, and that as between them there is no controversy, but they have agreed upon a partition of their rights and interests.

From this decree, defendant in error F. R. Wilson prosecuted a writ of error to the Supreme Court of Illinois, and that court, in an opinion rendered in the case of *Wilson* v. *Dresser*, 152 Ill., 387, reversed the decree of the Superior Court and remanded the cause.

Augustus N. Gage, a brother of the plaintiff in error H. H. Gage, filed a brief in that case and appeared in the

Supreme Court as counsel not only for his brother, H. H. Gage, but also for the plaintiffs in error, Fanny N. Dresser and Taylor A. Snow.

Said Augustus N. Gage, as counsel for all of the parties above named, stated in his brief, filed in this cause on the former hearing, before the Supreme Court of Illinois, that arrangements had been made between Fanny N. Dresser, Henry H. Gage and Taylor A. Snow *"whereby they mutually adjusted their equities between themselves."*

Said Gage, as counsel for said parties, then urged upon the attention of said court the various propositions that were raised by counsel on the second hearing before said Supreme Court, in reference to the bankruptcy proceedings of F. R. Wilson—the alleged fraudulent conveyance by said Wilson of the property in question to Julia Wilson, his sister—the alleged claim that Taylor A. Snow purchased at the bankruptcy sale all the right, title and interest of Frederick R. Wilson—and that no interest passed to Julia Wilson by reason of the fraud of Frederick R. Wilson.

Wilson's testimony upon the first hearing of this case before a Master in Chancery of said Superior Court, was as follows (pp. 242-265): That on the 28th day of May, 1864, he, Wilson, received a tax deed for the property in controversy from the City of Chicago; that he put a house upon said property and leased it to various tenants until said Wilson conveyed said property to Julia Wilson, his sister, on July 6, 1877; that after it had been so conveyed to said Julia Wilson, Frederick R. Wilson, as the agent of his sister, collected the rents for the property, executed leases in the name of Julia Wilson, and continued to manage said property until the death of said Julia Wilson, on December 15, 1887; that after the death of said Julia Wilson, Frederick R. Wilson, as the sole devisee of

his sister, became the owner of said premises, and continued to occupy them as his own. Frederick R. Wilson further testified on the former hearing of this case (pp. 273-276) that when he said the property was given to Julia Wilson, in the nature of a trust deed, he meant that it was given with a certain understanding conditionally; that he (Wilson) should pay all the taxes and keep the property from being sold, and that if he did not do so it was to go to her as a regular deed. With that evidence before it, the Supreme Court of Illinois said, on the former writ of error, in *Wilson* v. *Dresser*, 152 Ill., 387, opinion page 390:

> *"He (meaning Wilson) shows a deed to himself for the property from the City of Chicago, dated May 24, 1864, and that he and his sister, Julia Wilson, remained in possession to the bringing of this suit. Manifestly, then, the case must turn upon whether the Superior Court erred in finding against him on his claim of title, on the ground that it was divested by the assignee's sale and conveyance to Snow. That he had possession under his deed, and that he conveyed to his sister, Julia Wilson, is not denied. It must also be conceded that if she owned the property at the time of her death it passed, under her will, to him. It does appear that about a year after he made the deed to his sister he went into bankruptcy, and it is claimed by defendants in error that on the motion of his creditors he was adjudged to still be the owner of the property, and the same was ordered sold, and afterwards conveyed by his assignee to the purchaser. The evidence, as abstracted, wholly fails to support that contention, and counsel for defendants in error does not even cite pages of the record in support of it. All that appears from the abstract on the subject is the following: 'Bankruptcy proceedings, showing property in question was never scheduled; that no indebtedness to Julia Wilson was scheduled; that the assignee, Jenkins, on the 20th day of July, A. D. 1889, sold whatever in-*

terest Wilson had in the property on the 30th day of August, 1878, to Taylor A .Snow.' Nothing more is here shown than that the assignee (not by order of court) sold whatever INTEREST *Wilson had on the 30th day of August, 1878, to Snow. But the evidence shows that at that time he had no interest, having more than a year prior to that date, July 6, 1877, conveyed it to Julia Wilson, and the evidence is undisputed as to the fact that she took possession under that deed, and retained it by her tenants to the date of her death, and that her tenants remained in such possession when this suit was begun. There being nothing to show that that deed was ever set aside or the property adjudged to remain in plaintiff in error, how can it be said that Julia Wilson did not die seized of it? Suppose she had willed it to a third party, would it be seriously contended, under the evidence shown in this abstract, that such third party took no title under the will? We certainly think not. And we find nothing in this record upon which to base a distinction between the rights of plaintiff in error and any other devisee to whom she might have willed it.*

"We are of the opinion, then, that the decree of the Superior Court is not supported by the evidence as it is presented to us, and that for that reason it must be reversed. The cause will be remanded, with directions to the Superior Court to allow such amendments to the pleadings as either party may desire to make, and to allow either of them to offer any additional competent proof."

Said court also held in its opinion on the former writ of error (p. 390) that there was no evidence that Fanny N. Dresser was the owner of the paper title to the premises in controversy, and for that reason the decree finding title in her was erroneous.

December 7, 1894, the remanding order of the State Supreme Court was filed in the Superior Court of Cook County, and the case redocketed.

June 29, 1900 (p. 24), Fanny N. Dresser, plaintiff in error, filed an amended bill, which contained in all respects the same allegations in reference to the title of Frederick R. Wilson; charged that he went into bankruptcy; that his title was divested by an order of that court and that Taylor A. Snow acquired Wilson's interest. The bill of complaint, however, set up the title in Fanny N. Dresser from the government, and in that respect corrected the errors in her former bill of complaint.

Taylor A. Snow (p. 32), H. H. Gage (p. 35) and F. R. Wilson (p. 30) filed answers to this amended bill, and Taylor A. Snow also filed an amended cross-bill on February 19, 1901. (P. 42.)

All of these pleadings of the plaintiffs in error, Snow and Gage, were but repetitions of the matters contained in their former pleadings, and the defendant in error, F. R. Wilson, set up in substance the same answer to the amended bill of Fanny N. Dresser that was contained in his former answers.

Replications were filed to the various answers (pp. 38-40), and on April 5, 1901, the case was heard before Arthur H. Chetlain, one of the judges of the Superior Court of Cook County, upon evidence adduced in open court.

It will thus appear that the issues made by the various pleadings of the parties to this cause were precisely the same on the second hearing as on the first, with the exception that the plaintiff in error, Fanny N. Dresser, alleged a title from the government.

Counsel for complainant proved the record title of Fanny N. Dresser and also various tax deeds of the premises in controversy, all of which tax deeds were shown to belong to the plaintiff in error, Henry H. Gage, and which appeared upon their face to be invalid.

Defendant in error, Frederick R. Wilson, offered in evidence his own deposition, and that of the other witnesses taken before Master in Chancery Noyes. (P. 241.) These depositions were all a part of the record in this case and constituted the evidence upon which this case was heard in behalf of Frederick R. Wilson on the former trial in the Superior Court and the evidence upon which the State Supreme Court, in its former opinion, 152 Ill., 387, reversed the decree of the Superior Court.

Frederick R. Wilson was also called as a witness and gave substantially the same testimony that he did upon the former hearing, except that he went more into details. He testified that he got the deed from the City of Chicago in 1864; that he at once fenced the premises in controversy and put in a tenant by the name of McCormick; that McCormick erected a house upon the premises which Wilson afterwards purchased. (P. 84.)

Various written leases were offered in evidence by Frederick R. Wilson to numerous tenants, and Wilson testified that he collected the rent from these tenants and exercised absolute dominion and control over the property without any interference by any person. Frederick R. Wilson paid all the taxes levied upon this property from 1864 until 1872. (Pp. 180-193.) On July 6, 1877, Frederick R. Wilson conveyed by his deed the premises in controversy to Julia Wilson, his sister, which deed was acknowledged before a notary public of Cook County at the time it was executed, but was not recorded until March 14, 1885. (P. 115.)

The evidence, however, was undisputed on the second trial as it was on the first, that Julia Wilson, by her tenants, took immediate possession of the premises after the execution of this deed on July 6, 1877, and continued in possession until her death on December 15, 1887. From July 6, 1877, until the 15th day of December, 1887, all the leases

of the property in question were executed in the name of Julia Wilson, with the single exception of a lease for one part of the premises in controversy, which was executed by mistake in Frederick R. Wilson's name. Wilson also accounted to his sister, Julia, for the rents collected on this property during this period, and he also had a written power of attorney authorizing him to collect this rent and transact this business for her. (P. 179.)

Other witnesses were called by Frederick R. Wilson to substantiate his evidence in reference to the uninterrupted possession by himself and his sister of this property until the filing of the bill of complaint in 1888. The consideration for the deed from Frederick R. Wilson to Julia A. Wilson, bearing date July 7, 1876, was $2,000, money borrowed by Frederick R. Wilson from Julia Wilson. (Pp. 220-221.) The deed included 110 pieces of property, but these properties were tax titles which had practically no market value. They were obtained by Frederick R. Wilson from a man to whom he had loaned some money. There is no evidence in the record that these pieces of property were worth more than the consideration paid by Julia Wilson. The deed was given to Julia Wilson on July 6, 1877, with the understanding that Wilson was to pay the taxes and was entitled to a reconveyance if he paid back Julia Wilson the sum of $2,000. Wilson, however, states that some time before he went into bankruptcy he found he could not raise money enough to pay the taxes, and that he then went back to New Jersey and told Julia Wilson that he was not able to pay the taxes; that she could have the property and that he made her a deed to it. Wilson is corroborated in this regard by the fact that the property in question was never scheduled in the bankruptcy court by F. R. Wilson, and by the further fact that the indebtedness of F. R. Wilson to Julia Wilson was not scheduled by

him in the bankruptcy court, and was never paid to her by F. R. Wilson.

It will thus appear that on all material points the testimony in this record is the same as that introduced on the former hearing. In fact it is more favorable to Frederick R. Wilson than was the testimony contained in the former record, because on the second trial Mr. Wilson explains exactly what he meant by a trust deed, and shows conclusively that on July 6, 1877, he made a conditional sale of the property to his sister and that before he went into bankruptcy, by agreement between Wilson and his sister, the conditional sale was made absolute and the property received by Julia Wilson in full satisfaction of her indebtedness. There is no evidence that there was any fraud in this conveyance—no evidence that Frederick R. Wilson ever intended to defraud any one—and no evidence that Julia Wilson ever knew that Frederick R. Wilson was contemplating going into bankruptcy.

On July 8, 1901 (p. 46), the Superior Court entered a decree in this case finding that the land in question was owned in fee simple by Frederick R. Wilson at the time the bill of complaint in this case was filed; that said Wilson acquired a tax deed from the City of Chicago bearing date the 24th day of May, 1864; that from the time Wilson obtained this deed up to July 6, 1877, Frederick R. Wilson was in possession of the land, and that from July 6, 1877, up to the death of Julia Wilson, December 15, 1887, Julia Wilson remained in possession of said premises; that the possession of F. R. Wilson, coupled with the possession of Julia Wilson, continued over a period of more than twenty years prior to the filing of the bill herein; that the deed bearing date July 6, 1887, was a conditional sale of the real estate conveyed to Julia Wilson; that within two or three months after the execution and delivery of the said

deed, by reason of the failure and inability of the said Frederick R. Wilson to comply with the terms and conditions of said sale entitling him to a reconveyance of said real estate, and by virtue of the agreement of the parties to said deed, said conveyance ceased to be a conditional sale and became an absolute sale of said real estate, and the title thereto of said Frederick R. Wilson and all his interests therein became vested absolutely in said Julia Wilson; that upon the death of said Julia Wilson the land became vested in Frederick R. Wilson, her only heir at law and devisee; that six tax deeds were issued conveying the property, all of which tax titles have been assigned to the defendant, H. H. Gage; that each is irregular and void; that the defendant, Snow, acquired no interest in said lands by the deed from Robert E. Jenkins; that Lilly Belle Dresser acquired no interest from Fanny N. Dresser by her deed, and H. H. Gage acquired none from Lilly Belle Dresser.

It was further ordered that the tax title of Henry H. Gage should be set aside upon the payment of $3,162.62, the amount of taxes paid by said Gage, together with interest thereon and costs.

From that decree Fanny N. Dresser prosecuted a writ of error to the Supreme Court of Illinois, and cross-errors were assigned by Taylor A. Snow and H. H. Gage.

BRIEF.

NO FEDERAL QUESTION IS HERE INVOLVED.

1. *The state court found that Julia Wilson was the owner* of the premises in controversy on August 30, 1878, when Frederick R. Wilson filed his petition in bankruptcy and that Taylor A. Snow took nothing at the assignee's sale.

2. On a writ of error to a state court the findings of fact of the state court are conclusive in this court.

Egan v. *Hart*, 165 U. S., 188-89.
Bement v. *National Harrow Co.*, 186 U. S., 70-83.

A decision of a state court against a party who claims that the title to his demand comes through a bankrupt assignee cannot be reviewed by the Supreme Court of the United States when no construction of such bankrupt act was called in question.

Calcote v. *Stanton*, 18 How., 243.

Where a state court decides that the title did not pass to an assignee in bankruptcy that question can not be reviewed on writ of error in this court.

Scott v. *Kelly*, 22 Wall., 57-59.
McKenna v. *Simpson*, 129 U. S., 506.

THIS CASE SHOULD BE AFFIRMED ON ITS MERITS.

I.

Fanny N. Dresser, the day before this bill of complaint was filed, transferred all her interest in the premises in controversy to the plaintiff in error, H. H. Gage, and this partition suit was filed by her in behalf of Gage, and for his benefit. She has no interest in the premises in question, and no right to prosecute this writ of error, but is colluding with plaintiffs in error, H. H. Gage and Taylor A. Snow, in prosecuting and maintaining a suit against them when there is no real controversy between herself and said Gage and Snow.

The court should refuse to take jurisdiction of a collusive suit prosecuted by a party who has no interest in the controversy.

In re Burdick, 162 Ill., 48-52-74.
Cleveland v. *Chamberlain*, 1 Black, 419.
American Wood-Paper v. *Heft*, 131 U. S., 92.
Dakota Co. v. *Glidden*, 113 U. S., 222.
The People v. *Gen'l Elec. Ry. Co.*, 172 Ill., 129-43.

II.

The Supreme Court of Illinois, on the former writ of error, 152 Ill., 387, had before it all the material evidence bearing upon this controversy that is contained in this record and the court then decided that the interest of Frederick R. Wilson was conveyed to Julia Wilson prior to the bankruptcy proceedings of Frederick R. Wilson, and that, therefore, Taylor A. Snow, as a purchaser at the sale of

Assignee Jenkins, acquired no interest in the premises in controversy, and that upon the death of Julia Wilson, on December 15, 1887, Frederick R. Wilson acquired the interest of Julia Wilson, as her devisee and sole heir at law.

Said court also held that the undisputed evidence showed that Frederick R. Wilson and Julia Wilson had been in uninterrupted possession of the premises in controversy for twenty years prior to the filing of the bill of complaint. The opinion and the judgment of said court on the former writ of error are *res adjudicata* of all questions there determined.

Wilson v. *Dresser*, 152 Ill., 387.
Smith v. *Neff*, 123 Ill., 310.
West v. *Douglass*, 145 Ill., 164.
McFarland v. *Washburn*, 26 Ill. App., 355.
World's Columbian Exposition v. *Lehigh*, 94 Ill. App., 433.
Newberry v. *Blatchford*, 106 Ill., 593.

III.

The uncontradicted evidence showed, and the Chancellor found, which finding was sustained by the Supreme Court of Illinois, that the deed of Frederick R. Wilson to Julia Wilson was based upon a valuable consideration and without any intent to defraud.

IV.

The undisputed evidence in this case showed, and the Supreme Court found, in accordance with the finding of the Chancellor of the Superior Court, that Taylor A. Snow, as the purchaser at the sale of Jenkins, assignee in bankruptcy of Frederick R. Wilson, acquired no title to the premises

in question, because Julia Wilson had taken possession of the property on July 6, 1877, under a deed of that date from Frederick R. Wilson to her.

V.

The denial by the District Court of the United States of the petition of Wilson to set aside the sale to Taylor A. Snow is not *res adjudicata* in reference to Wilson's title, because Wilson's present title is based upon a subsequent devise to him of the interest of Julia Wilson. Julia Wilson was not a party to the bankruptcy proceeding, and hence not bound by it.

Attorney General v. *C. & E. R. R. Co.*, 112 Ill., 520-39.
McCartney v. *Osburn*, 118 Ill., 403-10.
White v. *Sherman*, 168 Ill., 589-612.

VI.

It makes no difference, so far as plaintiffs in error are concerned, whether the deed of F. R. Wilson to his sister was fraudulent or not, because plaintiffs in error were not creditors of Frederick R. Wilson, and hence can not raise the question.

A fraudulent conveyance can only be assailed by *bona fide* creditors of the grantor. As to third persons, who do not stand in the position of creditors of the grantor, such a conveyance is valid.

Fetrow v. *Merriwether*, 53 Ill., 275-79.
Willard v. *Masterson*, 160 Ill., 443-5.
Rappleye v. *International Bank*, 93 Ill., 397-403.
14 Am. & Eng. Enc. of Law, 280c.
Etter v. *Anderson*, 84 Ind., 333-7.

VII.

The making of a fraudulent conveyance does not stop the statute of limitations from running nor deprive the grantee in such a conveyance from tacking his possession on to that of the fraudulent grantor.

Clark v. *Chase,* 5 Sneed (37 Tenn.), 636.

VIII.

There is no evidence that Julia Wilson ever knew that Frederick R. Wilson contemplated going into bankruptcy or that she took title with the intent to defraud his creditors.

A fraudulent conveyance can not be set aside unless both grantor and grantee are parties to the intended fraud.

Hatch v. *Jordan,* 74 Ill., 414-17.

Schraeder v. *Walsh,* 120 Ill., 403-12.

IX.

The continuity of possession was not broken in this case, because the undisputed evidence shows that the possession of Frederick R. Wilson was delivered to Julia Wilson and that all the acts of Frederick R. Wilson, in reference to the property, were in furtherance of and in recognition of Julia Wilson's title and never, at any time, hostile to her rights. And even if Wilson, by mistake, made a lease to a part of the premises in his own name, that would not interrupt the continuity of possession so long as he did not intend to assert a right in derogation to the title of Julia Wilson.

Reed v. *Prop. of Locks & Canals,* 49 U. S., 274-9.

X.

It is immaterial what was the form of the conveyance from Frederick R. Wilson to Julia Wilson so far as the continuity of the twenty years' adverse possession was concerned. Successive occupants of premises may tack on to each other's possession without any deed or writing whatsoever so long as the one occupant surrenders his possession to the second occupant with the understanding between both of them that the first occupant yields his title and possessory rights to the second.

Weber v. *Anderson*, 73 Ill., 439-44.

Faloon v. *Simshauser*, 130 Ill., 649-57.

ARGUMENT.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS CASE.

The evidence in this case shows that on the 28th day of May, 1864, defendant in error, Wilson, received a tax deed of the premises here in controversy from the City of Chicago, and that said real estate was occupied by said Frederick R. Wilson and his tenants until the 6th day of July, 1877; that at that time Frederick R. Wilson was indebted to his sister, Julia Wilson, in the sum of two thousand ($2,000) dollars, and at that time he executed a warranty deed to the premises here in controversy, together with numerous other lots to which he held certain tax deeds; that the deed was duly acknowledged before a notary public and delivered to Julia Wilson; that immediately thereafter Julia Wilson, by her tenants, took possession of said premises; that thereafter all leases of the property were executed in the name of Julia Wilson and rents were collected either by her or by Frederick R. Wilson for her benefit and that she continued in such possession, through her tenants, until the time of her death, on the 15th day of December, 1877; that after the death of said Julia Wilson, Frederick R. Wilson, as the sole devisee of his sister, became the owner of said premises and has ever since that time continued to occupy them as his own.

It is true that the deed to Julia Wilson, bearing date the 6th day of July, 1877, was not filed for record until March 14, 1885, but it is a rule of law, well recognized by the decisions of the Supreme Court of Illinois, as well as by the decisions of this court, that a person in possession of real

estate under an unrecorded deed as its absolute owner, takes a good title as against all the world.

Mr. Wilson testified that the deed of July 6th, 1877, was in the nature of a conditional sale to his sister; that his sister agreed at that time to reconvey the property, when said Wilson should repay her the amount of said loan, together with taxes and disbursements made on said property.

Wilson further testified that some time before he went into bankruptcy, he told his sister that he would not be able to repay her the amount of her money, but that she could have the property in satisfaction of his indebtedness to her.

After the title had thus become absolute in Julia Wilson, and on the 30th day of August, 1877, Frederick R. Wilson filed his petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, but he did not schedule the property here in controversy, because his sister, Julia Wilson, was then the absolute owner of said property, nor did he schedule any claim in favor of Julia Wilson, his sister, because that claim had been wiped out by the acceptance on Julia Wilson's part of the premises in controversy in satisfaction of said debt. Neither did Julia Wilson file any claim in said Bankruptcy Court.

On July 20, 1889, and more than ten years after Wilson's discharge in bankruptcy, Robert E. Jenkins, the assignee in bankruptcy of Frederick R. Wilson, under an order of the District Court of the United States, for the Northern District of Illinois, sold to plaintiff in error, Taylor A. Snow, all the right, title and interest of Frederick R. Wilson to the real estate here in controversy, and on the 22d day of July, 1889, said Jenkins, as assignee in bankruptcy, delivered to said Taylor A. Snow a deed under the order of said court. On September 17, 1889, Frederick R. Wilson filed a petition, seeking to set aside the sale to said Taylor A. Snow,

and on the 6th day of November, 1889, said petition was denied by the said District Court.

It appears then that on August 30, 1878, when said Frederick R. Wilson filed his petition in bankruptcy, he had no title to or interest in the premises here in controversy, but said property was the absolute property of Julia Wilson and she was then in possession by her tenants under the unrecorded deed of July 6, 1877, which had been made absolute by agreement of the parties long before the petition in bankruptcy was filed.

It goes without saying that, inasmuch as Robert E. Jenkins, assignee in bankruptcy of Frederick R. Wilson, had no title on July 20, 1889, Taylor A. Snow acquired nothing by his purchase under the order of the District Court on the 20th day of July, 1889.

The law is well settled that a purchaser at a bankruptcy sale acquires only the rights of the bankrupt.

Weber v. *Clark,* 136 Ill., 256-70.

The above facts are abundantly established by the evidence in this record and were found by the chancellor in the Superior Court, who heard the testimony of witnesses in open court, and these findings of fact were again approved and affirmed by the Supreme Court of Illinois in its opinion in this case. Such being the facts of this case, it is plain that no federal question is here involved.

This is not an appeal from a judgment of a federal court where the questions of fact are here open to review, but this is a writ of error from a state court. Where a case comes to this court by writ of error to the Supreme Court of a state, the findings of fact by the state court will be accepted by this court as conclusive. This court will not attempt to re-examine those questions of fact.

The case of *Egan* v. *Hart,* 165 U. S., 188, is directly in

point. That was a writ of error to a state court in a suit in equity and this court held that the findings of fact in the state court were conclusive in such a proceeding and said (189):

> "On error, however, to a state court, this court cannot re-examine the evidence, and when the facts are found below, is concluded by such finding. *Dower* v. *Richards*, 151 U. S., 658; *Bartlett* v. *Lockwood*, 160 U. S., 357; *Stanley* v. *Schwalby*, 162 U. S., 255, 278. * * * We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings."

The same doctrine was reiterated in the case of *Bement* v. *National Harrow Company*, 186 U. S., 70, page 83, where this court said, citing many authorities:

> "In this court we are concluded by the findings of fact made in a state court in a suit in equity as well as in an action at law."

It appears then from the facts found by the Superior Court of Cook County, as affirmed by the Supreme Court of the State of Illinois, that Taylor A. Snow took nothing by his purchase in the bankruptcy proceedings. The only theory on which it is claimed that a federal question is here involved is the contention that Taylor A. Snow acquired the premises in controversy by purchasing the same at a bankruptcy sale, held under the authority of the United States District Court, for the Northern District of Illinois. The state court did not deny the jurisdiction of the District Court of the United States to sell all the property of Frederick R. Wilson, and did not deny the right of the pur-

chaser at such a sale to enforce in a state court any rights acquired by him under the laws of the United States. In fact the Supreme Court of the State of Illinois gave full force and effect to the bankruptcy laws of the United States and conceded everything that counsel for plaintiff in error here claims, so far as the operation, construction and effect of those laws are concerned. The state court, however, found that the conveyance to Julia Wilson was not fraudulent, as claimed by the plaintiffs in error, but that said conveyance was made in good faith and supported by an adequate consideration. It is plain that the plaintiffs in error were not deprived of any right or immunity, held by them, by virtue of any statute of the United States.

This court has uniformly held that where no question is raised with reference to the construction of any statute of the United States, a federal question is not involved, simply because the unsuccessful litigant in the court below based his right upon a title acquired under a bankruptcy sale. In the case of *McKenna* v. *Lawren Simpson*, 129 U. S., 505, a suit was brought by an assignee in bankruptcy in a state court to set aside certain conveyances made by the bankrupt just before he went into bankruptcy on the ground that said conveyances were made with intent to defraud creditors. The state court found, as it did in the case at bar, that said conveyances were made in good faith and not with intent to defraud. The assignee in bankruptcy there prosecuted a writ of error to the Supreme Court of the State and insisted, as do the plaintiffs in error in this case, that a federal question was involved. This court held that so long as the state court did not deny relief to the assignee, by reason of any construction it placed upon the bankruptcy laws, but simply because he had failed to prove the fraudulent character of the conveyances, that this court had no jurisdiction, and said:

"In the proceedings in the state court no decision was made against the validity of any statute of, or authority exercised under the United States or against any title, right, privilege or immunity claimed under the Constitution of the United States or any statute thereof. No question, indeed, arose under the action of the state court, which could bring its decision within the provisions of section 709 of the Revised Statutes." * * * "The decision of the state court as to what should be deemed a fraudulent conveyance, does not present any federal question, nor does the application by the court of the evidence in reaching that decision raise one."

In *Scott* v. *Kelly*, 22 Wall., 57, an assignee in bankruptcy sought to enforce certain rights in a state court, and that court held adversely to him. This court dismissed his writ of error to the Supreme Court of the State of New York because no federal question was involved, and said, page 59:

"The writ of error in this case is dismissed for want of jurisdiction. The assignee in bankruptcy voluntarily submitted himself and his rights to the jurisdiction of the state court. Being summoned, he appeared without objection and presented his claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the state court to act in the premises and render judgment. The question presented for decision of the state court was not whether, if the bankrupt had title, it would pass to his assignee by operation of the bankruptcy act, but whether he had title at all. The court decided that he had not. Such a decision by a state court does not present a question of which this court can take jurisdiction upon a writ of error."

Applying the above succinct statement of the law to the facts of this case, the question presented for the decision of

the Supreme Court of Illinois was not whether, if Frederick R. Wilson had title, it would pass to his assignee, Jenkins, and by him to Taylor A. Snow, under the sale in bankruptcy, but rather whether Frederick R. Wilson at the time he went into bankruptcy, had any title at all. The state court decided that Frederick R. Wilson had no title to the premises in question at the time he went into bankruptcy. Such being the decision of that court, no federal question is here involved.

In *Calcote* v. *Stanton,* 18 How., 243, this court said where a party was attempting to review on writ of error the decision of a state court, under facts similar to the case at bar:

> "It is not enough to give jurisdiction to this court under this clause that the decision of the state court was against a party claiming title under some statute of or commission held under the United States The origin of the title may be an accident of the controversy, and not the subject of or substance of it. The suit must have drawn in question the construction of such statute or commission and the judgment of the state court must have been adverse to the claims set up under them."

It is clear within the authorities above quoted that the plaintiffs in error were defeated in the court below not by reason of any construction placed by the state court upon any statute of the United States, but the decision of the state court was adverse to the plaintiffs in error because the state court found that Frederick R. Wilson was not the owner of the premises at the time he went into bankruptcy, and hence the District Court of the United States never acquired any jurisdiction over the lands that are the subject matter of this suit. We respectfully submit that this writ of error should be dismissed for want of jurisdiction.

THE STATE COURT DECIDED THIS CASE CORRECTLY ON ITS MERITS.

Counsel for plaintiffs in error say that there are four questions involved in this case and that the Supreme Court of Illinois evaded each of those questions. An examination of this record and of the opinion of the Supreme Court of Illinois will show that that proposition is wholly unfounded. There are certain important questions on the merits of this case that have not been mentioned at all in the brief of counsel for plaintiffs in error and owing to that fact, we have pursued a somewhat different classification than that contained in their brief.

I.

THIS WRIT OF ERROR SHOULD BE DISMISSED BECAUSE FANNY N. DRESSER CRAMER HAS NO REAL INTEREST IN THE CONTROVERSY.

An examination of this record discloses this remarkable state of affairs: each of the plaintiffs in error appear in the Superior Court on the first trial by separate counsel and each claims to be the owner of the entire premises here in controversy by an independent source of title. That court finds against Wilson and on the first hearing in the Supreme Court of Illinois all of the plaintiffs in error appear jointly by the same counsel and say there is no controversy between them. The Supreme Court decides in favor of Wilson and on the second trial in the Superior Court and on the second hearing in the Supreme Court of Illinois the plaintiffs in error again appear by separate counsel and claim again under separate and hostile chains of title. Now the three plaintiffs in error prosecute a joint writ of error to the Supreme Court of Illinois, and file in this court a joint brief, all be-

ing represented by the same counsel. The interests of the three plaintiffs in error in this court are hostile to each other and their own counsel do not even venture to advise this court as to which of them is the owner of the premises in controversy, in case it does not belong to Wilson. Counsel do not pretend to say which one of their clients is the owner of the title in question; the only thing they seem to be certain of is that it does not belong to the defendant in error, Wilson.

On or about the first day of January, 1888, Frederick R. Wilson was the owner of and in possession of the premises described in the bill of complaint. He and his sister at that time had been in continuous, uninterrupted and adverse possession of said premises for more than twenty years.

The plaintiff in error, H. H. Gage, was the holder of various void tax deeds upon said premises. At that time Mr. Gage conceived the design of ousting Wilson from his possession, and for that purpose secured the co-operation of Fanny N. Dresser, now Cramer, who claimed to be the holder of the record title. Mr. Gage could not bring ejectment on his void tax titles. Fanny N. Dresser, alone, could assert no interest, because her rights had been ousted by twenty years' adverse possession.

Mr. Gage then conceived the design of having Fanny N. Dresser convey to her sister, Lilly Belle Dresser, an undivided one-third of the premises in controversy, and then have Fanny N. Dresser file a partition suit against Lilly Belle Dresser, the Dresser sisters to pretend that there was a controversy pending between them. By making Julia Wilson, H. H. Gage and Taylor A. Snow parties defendant to this suit it was thought that Mr. Gage could secure a decree awarding the title to be either in himself or in some one of these "dummies."

Pursuant to the foregoing arrangement, on the 31st day of January, 1888, Fanny N. Dresser conveyed to Lilly Belle Dresser an undivided one-third interest in the premises in controversy. On the same day, Lilly Belle Dresser, Fanny N. Dresser and Henry H. Gage entered into a written agreement by the terms of which the Dresser sisters should institute proceedings to clear the title from adverse claimants, and, when the title had been cleared, they were to convey the premises to the defendant in error, Henry H. Gage.

On the next day—February 1, 1888.—Fanny N. Dresser filed the bill in this case, purporting to be for a partition of the premises in controversy, against Henry H. Gage, Lilly Belle Dresser and Julia Wilson.

Afterwards Henry H. Gage conceived the design of purchasing the alleged title of Jenkins, assignee in bankruptcy of Frederick R. Wilson, and for that purpose induced one Taylor A. Snow, who had an office with Henry H. Gage, to purchase said alleged title for the sum of $250.

For the purpose of deceiving and imposing upon the court and counsel for Wilson, Taylor A. Snow did not ask to be made a party defendant, but Fanny N. Dresser, who had no interest in the controversy, but was a mere "dummy," acting for Henry H. Gage, caused a summons to be served upon Taylor A. Snow, and thereafter Taylor A. Snow answered, setting up that he had a title superior to Fanny N. Dresser and H. H. Gage and Frederick R. Wilson.

This "sham battle" was carried on between Fanny N. Dresser, Taylor A. Snow and H. H. Gage until the entry of the first decree in the Superior Court on August 11, 1890.

Fanny N. Dresser claimed that she was the owner of the title in her bill; Henry H. Gage, who was the owner of the Dresser title, asserted that he (Gage) had a superior title to the Dressers and everybody else; Taylor A. Snow,

who was a mere "dummy" acting for Henry H. Gage, asserted that he had a title superior to everybody else.

Fanny N. Dresser, in one of her bills, alleged that herself and Lilly Belle Dresser could not agree upon a partition of the premises, although it clearly appears from the foregoing observations that Lilly Belle Dresser had no interest in the controversy because the premises were conveyed to her so as to enable Fannie N. Dresser to institute this fictitious partition suit. And it further appeared that Fanny N. Dresser had no interest in the premises, because she had already agreed to convey all her interest to Gage when the premises had been cleared of adverse claimants.

The decree of the Superior Court entered August 11, 1890, which was drafted by counsel for H. H. Gage, recited that H. H. Gage claimed to have some interest by virtue of tax deeds, but that all such interests had been amicably adjusted between Fanny N. Dresser and H. H. Gage, and that Taylor A. Snow had made an amicable arrangement with the complainant and defendant H. H. Gage, and that as between them there was no controversy.

When Frederick R. Wilson prosecuted a writ of error to the State Supreme Court from that decree, Augustus N. Gage, a brother of H. H. Gage, appeared in that court as the sole counsel for Fanny N. Dresser, Taylor A. Snow and H. H. Gage.

Said Gage stated in his brief filed in said court, on the former writ of error, that arrangements had been made between Fanny N. Dresser, Henry H. Gage and Taylor A. Snow "whereby they mutually adjusted their equities between themselves."

There is nothing to show that this amicable arrangement, which was recited in the former decree in this case between Fanny N. Dresser, H. H. Gage and Taylor A. Snow, is not now in full force and effect.

Under the undisputed evidence in this record, then, Fanny N. Dresser had no interest in this controversy when her bill of complaint was filed, because by her written agreement she was merely to allow her name to be used by Mr. Gage for the purpose of litigating against Julia Wilson and Frederick R. Wilson.

The facts and circumstances in this case clearly show that Taylor A. Snow was at all times the mere "dummy" for H. H. Gage, and that if he ever had any interest in this controversy it was amicably adjusted by the decree above recited.

When this cause was redocketed in the Superior Court, by virtue of the remanding order, the "sham battle" that had been carried on prior to the entry of the first decree in the Superior Court was resumed.

Fanny N. Dresser, Taylor A. Snow and H. H. Gage, who were represented in the Supreme Court by the same counsel after the amicable arrangement hereinbefore recited had been entered into, now appear again in the Superior Court, each represented by separate counsel, each filing pleadings claiming to be the absolute owner of the premises here in controversy by independent sources of title. But, notwithstanding these external appearances of hostility, the record in this case clearly shows that there is no real controversy between said parties.

An examination of the record discloses that all the tax titles, by virtue of which Henry H. Gage claimed to be the absolute owner of the premises here in controversy, were introduced in evidence by counsel for Fanny N. Dresser.

Is it not strange that Fanny N. Dresser, who, under the undisputed evidence in this record has no interest, should alone have prosecuted a writ of error from the decree of the trial court to the State Supreme Court?

Is it not strange that Henry H. Gage and Taylor A. Snow and Fannie N. Dresser Cramer, each of whom claims

to be the absolute owners of the premises in controversy by virtue of independent sources of title, should be represented in this court by the same counsel?

It is a familiar proposition of law that where a suit is instituted by a person who has no interest in the controversy and no right to be heard, that suit should be dismissed. It is equally well settled, that where parties between whom there is no real controversy get together and arrange a fictitious suit for the purpose of injuriously affecting the rights of third parties, the court will, when its attention is called to that fact, dismiss such litigation.

In re Burdick, 162 Ill., 48, the court used the following emphatic language in reference to collusive litigation (opinion, 52):

> "It is the settled law that while a collusive or fraudulent suit is still pending, the court will at the suggestion of either a party to the record, or a person in interest or who may be prejudiced by the judgment, or even at the instance of a stranger who appears as *amicus curiae*, or upon its own motion, dismiss such suit out of court. (*Matter of Esam*, 3 Barn. & Cress., 597; *Coxe* v. *Phillips*, Hardw., 224; *Brewster* v. *Kitchen*, Comb., 424; *Smith* v. *Brown*, 3 Tex., 360.) And the same rule applies where the false and fictitious case is pending in a court of review on appeal or writ of error, and such appeal or writ of error will be dismissed. (*Lord* v. *Veazie*, 8 How., 251; *Bertemeyer* v. *Iowa*, 8 Wall., 129.) And the rule that is applicable where both parties collude to get up a case for the opinion of the court is applicable to a case where one of the parties becomes owner of the whole opposing interest and sole party in interest, and is *dominus litis* on both sides."

In *Cleveland* v. *Chamberlain*, 1 Black., 419, complainant filed a bill to set aside certain fraudulent conveyances

and prosecuted said bill with vigor and in good faith until he obtained a decree setting aside said conveyances. A month after the decree was entered the controversy was amicably arranged between the parties, but for the purpose of defeating the rights of other creditors of the defendant the case was appealed to the Supreme Court of the United States and an attempt thus made to reverse the judgment of the court below.

This court dismissed the appeal and said (opinion, 426):

> "It is plain that this is not adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited (*Lord* v. *Veazie*, 8 Howard, 254) in this alone, that there both parties colluded to get up an agreed case for the opinion of this court, and here Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself in order that he may obtain an opinion of this court affecting the rights and interest of persons not parties to the pretended controversy."

In *American Wood Paper Co.* v. *Heft*, 131 U. S. (Append.), 92, and *Dakota County* v. *Glidden*, 113 U. S., 222, an appeal and a writ of error were each, respectively, dismissed in this court on the ground that the party prosecuting the appeal and the writ of error were carrying on fraudulent and collusive litigation.

II.

THE OPINION AND JUDGMENT OF THE STATE SUPREME COURT ON THE FORMER WRIT OF ERROR, 152 ILL., 387, IS RES JUDICATA OF ALL THE MATERIAL QUESTIONS RAISED ON THIS HEARING.

The law is well settled that where a case is once heard on appeal or writ of error and an opinion is rendered that

opinion is *res judicata* on a second appeal or writ of error between the same parties if the evidence on the second appeal or writ of error is substantially the same.

On the former writ of error, the state court decided three propositions. First, that Fannie N. Dresser had not proved her title from the government. Second, that the title relied upon by Frederick R. Wilson was not divested by the sale of Jenkins, assignee in bankruptcy, to Taylor A. Snow, because the evidence showed that prior thereto and on July 6, 1877, Wilson conveyed his interest to Julia Wilson and that she then took possession, and that possession continued until her death, and that upon her death, Frederick R. Wilson, as her sole devisee, succeeded to her title. Third, that Frederick R. Wilson and Julia Wilson, his sister, had been in continuous and uninterrupted adverse possession of the premises here in controversy for more than twenty years prior to the filing of the bill of complaint.

True, the cause was remanded with directions to permit either party to amend their pleadings and allow any additional competent proof. The only material amendment made by the pleadings, after this reversal, was the allegation by Fanny N. Dresser showing that she had acquired title from the government. The only additional proof offered of any substantial import was the proof by Fanny N. Dresser that she had acquired that title from the government.

On the question of the twenty years' adverse possession by Frederick R. Wilson and Julia, his sister, the evidence in this record is exactly the same as that contained in the former record. On that question Wilson and certain tenants that resided on the premises were the sole witnesses on the former hearing, and they were the only witnesses on the second trial.

The propositions urged by counsel in their briefs that

the interest of Frederick R. Wilson was divested by the sale in bankruptcy to Taylor A. Snow, that Julia Wilson acquired no title because the conveyance to her was made with the intent to hinder and defraud the creditors of Frederick R. Wilson, that the denial of the petition of Frederick R. Wilson to set aside the sale to Taylor A. Snow was *res judicata* that Wilson's interests had been divested—all of the above propositions were urged at great length on the former writ of error. The evidence in the former record in reference to these matters were, in all material respects, precisely the same as that contained in this record.

There the court disposed of all the contentions of counsel in the following emphatic language:

> *"But the evidence shows that at that time (referring to the time Wilson went into bankruptcy) he had no interest, having more than a year prior to that date, July 6, 1877, conveyed it to Julia Wilson, and the evidence is undisputed as to the fact that she took possession under that deed and retained it by her tenants to the time of her death, and that her tenants remained in such possession when this suit was begun. There being nothing to show that the deed was ever set aside or the property adjudged to remain in plaintiff in error, how can it be said that Julia Wilson did not die seized of it? Suppose she had willed it to a third party, would it be seriously contended under the evidence shown in this abstract that such third party took no title under the will? We certainly think not."*

The additional evidence offered by plaintiff in error in reference to her title from the government can not avail her on this writ of error, because if her title had been divested by twenty years of adverse possession in accordance with the foregoing opinion of the state court, then, manifestly, she is not entitled to recover.

The case of *West* v. *Douglass* is on all fours with the

case at bar. That case was first passed upon in 140 Ill., 455. There a bill was filed to restore a lost deed and to confirm title. On the first trial the only defense offered was that the deed was not executed. After the case was reversed and remanded to the Circuit Court for a new trial, two defenses were made, first, that the deed was not executed, and, second, that the party executing the deed, if it was executed, was of unsound mind.

The court held that as to the first defense above mentioned the decision in the 140 Ill. was conclusive, because no new evidence of a controlling character had been introduced on the second trial, and the question was not open to further controversy in view of the former adjudication.

Speaking of the first trial, the court said:

> "The Circuit Court reached the conclusion that the delivery and acceptance of the deed was not established, and thereupon rendered a decree dismissing the bill for want of equity, but this court, upon appeal, reviewed the evidence and held that a delivery and acceptance sufficient to pass title to the grantees was proved, and entered a judgment reversing the decree and remanding the cause to the Circuit Court for further proceedings not inconsistent with the opinion filed.
>
> "Under the remanding order the parties were doubtless at liberty to introduce further evidence pertinent to any of the issues made by the pleadings. If additional evidence bearing upon the question of delivery and acceptance was in existence and available, the defendant was at liberty to present it, and, if in so doing, he had succeeded in making out a case essentially different from the one presented to this court on the former appeal, he would now be at liberty to assign for error the decision of the court below upon the case thus made as *res nova*, but he did not do so. At the second hearing the case was submitted, so far as that issue was concerned, upon substantially, if not precisely, the same evidence as before. Under these cir-

cumstances our former decision, so far as the question of delivery and acceptance is concerned, is conclusive, and that branch of the case must now be treated as *res judicata.*"

In *World's Columbian Exposition Co.* v. *Lehigh*, 94 Ill. App., 433, the precise question here presented was decided. There the trial court, at the conclusion of the evidence, directed a verdict in favor of the defendant, and on appeal to the Appellate Court the judgment was reversed and the case remanded, with directions to submit the case to a jury. On a second trial a judgment was obtained in behalf of the plaintiff, and, on further appeal to the Appellate Court, it was sought by the defendant to raise in the Appellate Court the proposition that the trial court, on the second trial, erred in submitting the case to the jury. The court held that the opinion on the first appeal, holding that the case should have been submitted to a jury, was *res adjudicata* on that subject.

Applying the reasoning of the above cases so eminently sound to the case at bar, we find that on every material issue raised by counsel for the respective parties on this writ of error was presented and decided on the former writ of error on substantially the same pleadings and upon the same evidence.

Under such circumstances this court is not called upon to re-examine the merits of this controversy, but should dismiss the writ of error upon the ground that no new issues are here presented.

The defense of *res judicata,* by reason of a former judgment of court, need not be presented by plea, but it is sufficient to direct the attention of the court to the former record and opinion.

Newberry v. *Blatchford,* 106 Ill., 584-593.

III.

THE DEED FROM FREDERICK R. WILSON TO JULIA WILSON WAS BASED UPON A VALUABLE CONSIDERATION AND WITHOUT ANY INTENT TO DEFRAUD.

The undisputed evidence in this case showed, and the Chancellor found, that the deed of Frederick R. Wilson to Julia Wilson was based on a valuable consideration and without any intention to defraud creditors. The court also found that at the time Frederick R. Wilson went into bankruptcy he had no title to, or interest in, the premises in question, having conveyed the title and delivered possession to Julia Wilson on July 6, 1877.

True, the deed was not recorded until 1885, but that is immaterial so long as the evidence showed, and the Chancellor found, that Julia Wilson took actual possession at the time the deed was executed.

IV.

THE DENIAL BY THE DISTRICT COURT OF THE UNITED STATES OF THE PETITION OF WILSON TO SET ASIDE THE SALE TO TAYLOR A. SNOW IS NOT RES ADJUDICATA IN REFERENCE TO WILSON'S PRESENT TITLE.

Frederick R. Wilson filed his petition to set aside the sale of the interests of Frederick R. Wilson to Taylor A. Snow on the 17th day of September, 1889, reciting in said petition that he had, subsequent to said sale, become the owner of the property under the last will and testament of his sister, Julia Wilson.

The court denied that motion. It is a self-evident proposition that if Wilson had acquired his interest in the property from Julia Wilson under her last will and testament, and that Julia Wilson had acquired the premises in contro-

versy from Frederick R. before he went into bankruptcy, then the District Court, by its order of sale, conveyed nothing by the sale from Jenkins, assignee, then it was unnecessary to ask the District Court to go through the idle ceremony of setting aside that sale.

Julia Wilson acquired both a deed of conveyance and the possession of the property in question before the petition in bankruptcy of Frederick R. Wilson was filed. She was not a party to the bankruptcy proceeding, hence her title was not and could not have been affected by the order of sale. If her title was not affected by the order of sale, the court properly denied the motion of Wilson, as her devisee, to set aside an order entered in a case to which she was not a party.

The doctrine that the decision of a court is *res adjudicata* of nothing except what is necessarily involved in the controversy is clearly settled by the decisions of the Supreme Court of Illinois.

In *McCartney* v. *Osburn,* 118 Ill., 403, the court said, in its opinion (410):

> *"Before a former decision can be successfully invoked as an estoppel in another suit between the same parties, it must appear that the question is the same in both cases, and that the court in the former suit had power and jurisdiction to determine it."*

And in *White* v. *Sherman,* 168 Ill., 589, the court said in its opinion (612):

> *"Former adjudication to constitute a bar must have been on what was actually in issue and the determination of which was essential to the judgment."*

V.

A FRAUDULENT CONVEYANCE CAN ONLY BE ASSAILED BY BONA FIDE CREDITORS OF THE GRANTOR. MOREOVER THE RECORD FAILS TO DISCLOSE THAT FREDERICK R. WILSON WAS INDEBTED TO ANYONE WHEN HE MADE THE CONVEYANCE TO JULIA WILSON.

Plaintiffs in error were not creditors, and hence are not in a position to attack the conveyance.

It has been contended in this case that if the conveyance to Julia Wilson was made with intent to defraud the creditors of F. R. Wilson, such a conveyance is utterly void as to Fanny N. Dresser and Gage and all the world, and that such a conveyance, of itself, arrested the running of the statute of limitations. That proposition is obviously unsound. Various cases have been cited wherein such conveyances have been designated by this court as "void."

The cases referred to by counsel were all cases where a creditor of the vendor sought, in a direct proceeding, to set aside such a conveyance.

The law is well settled that a fraudulent conveyance vests the title to the property in the vendee and is valid so far as all the world is concerned except as against *bona fide creditors of the grantor.*

In the case of *Rappleye* v. *International Bank*, 93 Ill., 396, the distinction contended for is clearly pointed out. There the court said (opinion, 403):

> *"It is a mistaken notion that after the making of a fraudulent conveyance as to creditors, there remains in the fraudulent grantor an equitable estate in the land conveyed. If this were so he could sell and convey to another such estate. But the fraudulent conveyance is good as against the grantor, and as respects himself vests all his interest in the land, equitable as well as legal, in the grantee. The deed is voidable by creditors and the estate conveyed is subject to be divested by their action."*

Again, in *Willard* v. *Masterson*, 160 Ill., 443, the court, in speaking of a fraudulent conveyance, said (445):

> "The first contention of the plaintiffs in error is, that the sheriff's sale of the lots was irregular and passed no title, for the reason that the judgment debtor had divested herself of all interest and title in the lots. *It is true, the deed of Mrs. Willard and husband to Mrs. Snyder was good and effective to pass the title of the debtor as against her, and all the world, except bona fide creditors. This doctrine has been repeatedly announced by this court.*"

In *Etter* v. *Anderson*, 84 Ind., 333 (opinion, 337), the court said:

> "It is firmly settled, by the repeated decisions in this state, that a contract for the sale or conveyance of property, to hinder or delay creditors, is illegal as to creditors only. As between the parties, and as to all others than creditors, it is legal and valid."

In 14 Am. & Eng. Enc. of Law, 2d Ed., 280, the following rule is laid down, sustained by an exhaustive citation of authorities:

> *"The rule is well established that a sale or conveyance of property which is fraudulent as to creditors, can not be taken advantage of by one not a creditor."*

There is no evidence in this record, nor was any attempt ever made, to show that F. R. Wilson was indebted to any person at the time he made the conveyance to Julia Wilson, or that the conveyance was made in contemplation of becoming indebted.

VI.

THE MAKING OF A FRAUDULENT CONVEYANCE DOES NOT ARREST THE RUNNING OF THE STATUTE.

Even if it be conceded that the conveyance to Julia Wil-

son was fraudulent, that did not arrest the running of the statute of limitations in this case.

The case of *Clark* v. *Chase*, 5 Sneed (37 Tenn.), 636, page 638, is in point. There the precise question here presented was decided. The court said (opinion, 638):

> "It has been often held that the statute would protect possession under a forged or fraudulent deed of any description; that the statute made no exception in such cases and the courts could make none. It would not be insisted that if William Ford had continued in possession all the time he would not have been protected although his title was fraudulent. But if Chase held under him by lease or purchase what difference could it make? They are not trespassers, but enter and hold under paper titles claiming adversely to all others."

VII.

A CONVEYANCE CAN NOT BE AVOIDED ON THE GROUND OF FRAUD UNLESS BOTH GRANTOR AND GRANTEE PARTICIPATE IN IT.

Even if it be conceded that Frederick R. Wilson intended by this deed to defraud his creditors, that would not be sufficient to enable the creditors to set it aside. It would have to be further proved that the grantee in the deed participated in such fraud.

In *Hatch* v. *Jordan*, 74 Ill., 414, the court said (417):

> "We understand the rule to be well settled in this state, that in order to impeach a conveyance for fraud both vendor and vendee must be shown to have intended to commit the fraud before the deed can be avoided."

And in *Schraeder* v. *Walsh*, 120 Ill., 403 (412), the court said:

> "As a general rule, to render a sale or a conveyance fraudulent, as to the creditors of the vendor, there must be mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser."

We submit:

First—That this writ of error should be dismissed for want of jurisdiction.

Second—That this writ of error should be dismissed because the alleged controversy between Fannie N. Dresser Cramer and Taylor A. Snow and Henry H. Gage is collusive and fictitious.

Third—If this court examines into the merits of this case, it will be found that the decision of the Supreme Court of Illinois on all the questions here involved, was in accordance with the law and facts and should be affirmed.

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